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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO GAULDIN,

Defendant and Appellant.

D052093

(Super. Ct. No. SCD203390)

In re MARIO GAULDIN
on Habeas Corpus.

D053283

APPEAL from a judgment of the Superior Court of San Diego County, and
petition for writ of habeas corpus, John M. Thompson, Judge. Judgment affirmed;
petition denied.

Mario Gauldin appeals from a judgment entered after the trial court found him
guilty of being a felon in possession of a firearm and a jury found him guilty of burglary,
robbery, assault with a deadly weapon, grand theft of a firearm, making a criminal threat
and evading an officer. He appeals, contending the trial court abused its discretion when

it denied his request to sit in the audience during the victim's in-court identification. He also asserts the trial court erred in (1) using his prior juvenile adjudications as strikes and (2) imposing consecutive terms based on facts not found by a jury beyond a reasonable doubt. Finally, in his petition for writ of habeas corpus, he contends his counsel was ineffective for failing to object to the in-court identification procedure used for his cohorts. We reject his arguments, affirm the judgment and deny his habeas corpus petition.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts

a. People's Case

Consistent with the standard of review, we summarize the facts in the light most favorable to the judgment. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

On December 11, 2006, Jarrod Buchanan was cleaning his handgun when he heard someone at the front door of his Rancho Penasquitos home. He set the gun, which had a fake round in the chamber and no magazine, on the counter to answer the door. Gauldin and Kimberlee Snowden were at the door dressed in uniforms from The Cleaning Authority, a company he had hired to clean his home. Buchanan invited them inside after they told him they were there to conduct a customer satisfaction survey.

While Snowden interviewed Buchanan, Gauldin asked to use the bathroom. Buchanan became suspicious when he saw that the bathroom door was open and Snowden stumbled over her words as if she were stalling for time. Buchanan then saw Gauldin come towards him holding a red box cutter knife. Gauldin waved the knife as he

grabbed Buchanan by the sleeve and pushed him into the bathroom. When Buchanan saw Gauldin temporarily block the knife blade with his own body, Buchanan leapt at him and ran to grab his gun. Gauldin yelled "gun" and jumped on Buchanan, slashing Buchanan's hand several times with the knife. After Gauldin bit him in the forearm, Buchanan let go of the gun.

Gauldin pointed the gun at Buchanan and ordered him into the bathroom. Gauldin repeatedly told Buchanan to not look at him; he also pulled the slide back on the gun and looked into the chamber. While Buchanan was in the bathroom, Gauldin put on a pair of rubber gloves and started to wipe off the surfaces he had touched.

Gauldin looked into the hallway and spoke to his cohort, Eric Carter, a person who had previously cleaned Buchanan's house. After Carter told Gauldin to have Buchanan open the safe, Gauldin lead Buchanan to the safe, which was already open. Gauldin then lead Buchanan back to the bathroom and saw Buchanan's old safe on the ground. Gauldin threatened to kill Buchanan if he did not open the second safe, but Buchanan was unable to open it after multiple attempts.

Gauldin returned Buchanan to the bathroom and closed the door. Ultimately, Buchanan armed himself with the shower curtain rod and opened the door, but his assailants had already left. Buchanan ran outside yelling for someone to call "911" and the police arrived about five minutes later.

Yvonne Warrick, who lived across the street from Buchanan, noticed a red car parked in front of her house on the day of the crime. She wrote down the license plate number because the doors were ajar and the driver, a Black woman, was putting the car

back and forth into gear. She saw a tall Black man put something in the trunk of the car and then walk into Buchanan's home. She was not suspicious until she heard the red car leave and Buchanan yell that he had been robbed. Warrick later identified Snowden as the woman inside the car and Carter as the tall man who put items inside the trunk of the car; however, she never saw the third individual.

Police quickly located and pursued the car, which was registered to Snowden. After evading police, the car got trapped behind stopped traffic. Gauldin and Carter fled, but Snowden stayed inside the car. Police pursued Gauldin in their patrol cars and then on foot and captured him as he pulled a handgun from his pants pocket. Police recovered the gun, which had been stolen from Buchanan, and found a red box cutter knife and a pair of blue latex gloves when they searched Gauldin.

On the day of the incident, Buchanan viewed three photographic lineups containing photos of Gauldin, Carter and Snowden, but was unable to identify the three suspects. During the incident, Buchanan distinctly remembered that Gauldin wore his hair in braided corn rows. However, when the police photographed Gauldin later in the day, his hair was frizzy as if recently taken out of braids, but in the lineup photograph showed to Buchanan, Gauldin had his head shaved and a light mustache. Carter had a shaved head on the day of the crime, but the photograph used in the lineup depicted him with hair down to his collar. Snowden also looked younger in her lineup photograph than on the day of the crime. During trial, however, Buchanan had no doubt in his mind that Gauldin was the individual involved in the incident that had cut him with the box cutter.

DNA testing revealed Buchanan's blood on Gauldin's pants, the cutting edge of the box cutter knife and the outside of the gloves recovered from Gauldin's pocket. Gauldin's DNA was also found inside the gloves and he could not be excluded as a contributor to the DNA found on the handle of the box cutter. Carter and Snowden's DNA were not found on gloves or the box cutter.

b. Defense Case

At trial, Gauldin denied accompanying Carter and Snowden to Buchanan's house. He claimed that early that morning, he was with Carter and Snowden at a park and told them that he wanted to buy a gun. Carter knew someone who could sell him a gun and the prospective seller "Jayski" arrived at the park a short time later. Jayski did not trust and refused to do business with Gauldin and Carter then dropped Gauldin off at Gauldin's girlfriend's home.

Several hours later, Carter returned to the park in a car driven by Snowden and showed Gauldin a gun missing its magazine. Gauldin had the pair drive him home, but on the way there police cars got behind them and attempted to pull them over. At some point, Gauldin told Snowden to let him out of the car. As he jumped out of the car, Carter gave him the handgun and told him to throw it away. Gauldin claimed that he ran because he was on parole and with a convicted felon who had a gun.

Gauldin denied having the box cutter knife or gloves in his pocket, claimed he never touched the knife and that he had never seen the knife or gloves before. However, he also claimed that the gloves were on the backseat when he got to Snowden's car the second time and that he threw them on the floor of the car. Gauldin admitted that he had

taken the braids out of his hair after he was arrested, but claimed he did not do so to frustrate witness identification.

2. Procedural Background

An information was filed charging Gauldin with burglary, robbery, assault with a deadly weapon, grand theft of a firearm, making a criminal threat, recklessly evading a police officer and felon possessing a firearm. It also alleged that he personally used a firearm and a deadly weapon and inflicted great bodily harm. Finally, it was alleged that Gauldin had two strikes and served two prior prison terms.

Gauldin waived his right to a jury trial on the charge of being a felon in possession of a firearm and the trial court found him guilty of the charge. A jury later found him guilty of the remaining charges and found true the weapon use allegations, but found not true the great bodily injury allegation. Gauldin admitted the strikes and prior prison term allegations. The trial court later dismissed one of the strikes and sentenced Gauldin to a total prison term of 27 years 8 months. Gauldin timely appealed.

DISCUSSION

I. In Court Identification

1. Facts

Gauldin asked to sit in the audience during Buchanan's testimony, rather than at counsel table, to test Buchanan's ability to identify him. Defense counsel argued that Buchanan could not pick Gauldin out of a photographic lineup and that Buchanan identified Gauldin at the preliminary hearing only because Gauldin was sitting at counsel

table. The People objected to the request, noting that Gauldin could have moved to conduct a live lineup; the court denied the request without comment.

2. Analysis

Gauldin claims the trial court abused its discretion when it summarily denied his request because in-court identifications are inherently suggestive and there was a reasonable chance that had he sat in the audience, Buchanan would not have been able to identify him and the jury would have found him not guilty.

Gauldin relies on federal appellate authority to argue that an in-court identification procedure in which the witness points out the defendant, who is seated at the table with counsel, is inherently suggestive. (*United States v. Burdeau* (9th Cir. 1999) 168 F.3d 352, 358; *United States v. Williams* (9th Cir. 1970) 436 F.2d 1166, 1168; *People v. Bradford* (1997) 15 Cal.4th 1229, 1292 [cases from federal courts of appeals are persuasive rather than binding authority on the courts of this state].) While we agree that there is inherent suggestiveness where a defendant sits next to defense counsel for an in-court identification, there is no "constitutional entitlement to . . . particular methods of lessening the suggestiveness of in-court identification[s]. . . . These are matters within the discretion of the court. [Citation.]" (*United States v. Domina* (9th Cir. 1986) 784 F.2d 1361, 1369.)

Gauldin has not cited any California case to support his contention that a court abuses its discretion when it denies a request to move the defendant elsewhere in the courtroom for an in-court identification. Rather, the defendant's identification presents a question for the trier of fact (*People v. Rist* (1976) 16 Cal.3d 211, 216, superseded on

other grounds as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393) and inconsistencies between trial testimony and pretrial identifications go to the weight of the evidence, not its admissibility. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1197 ["[T]he positive, in-court identification of a defendant . . . need not be excluded merely because the victim has previously failed to make a positive identification from a photographic display These circumstances do not amount to an impermissibly unfair one person showup"].)

Here, defense counsel questioned Buchanan about his identification of the three suspects and the jury was made aware of Buchanan's inability to identify Gauldin from photographic lineups prior to the identification at the preliminary hearing. Additionally, the trial court instructed the jury with CALCRIM No. 315 regarding the factors affecting the accuracy of witness identification and counsel argued the issue of Buchanan's identification and the credibility of Gauldin's version of the facts to the jury.

Accordingly, the trial court reasonably denied the request because the jury had all the necessary facts with which to weigh the reliability of Buchanan's in-court identification and was correctly instructed on how to undertake the evaluation. (*Watkins v. Sowders* (1981) 449 U.S. 341, 347 ["proper evaluation of [identification] evidence under the instructions of the trial judge is the very task our system must assume juries can perform"].) The quickness of the trial court's decision on the request, standing alone, is insufficient to show an abuse of discretion.

In any event, even assuming the trial court abused its discretion and that Buchanan would not have been able to identify Gauldin while he sat in the audience, Gauldin

cannot show a different verdict was reasonably probable in light of the significant circumstantial evidence linking him to the crime. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

When police arrested Gauldin, he had possession of Buchanan's stolen gun, the red box cutter knife that Buchanan recognized and gloves. Additionally, strong forensic evidence connected Gauldin to the crimes; Buchanan's blood was found on Gauldin's pants, the cutting edge of the box cutter knife and the outside of the gloves recovered from Gauldin's pocket. Further, Gauldin's DNA was found inside the gloves. Additionally, the identification issue was largely one of credibility. (See CALCRIM No. 315.) Although Gauldin had a story to explain the incriminating evidence against him, he had no witnesses to corroborate his version of the incident and the People argued that Gauldin's story was not believable.

II. *Use of Prior Juvenile Adjudications as Strikes*

Gauldin contends that because there is no right to trial by jury in juvenile proceedings, the use of his prior juvenile adjudications as strike prior convictions was unconstitutional. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) This issue is pending before the California Supreme Court. (*People v. Nguyen* (2007) 152 Cal.App.4th 1205, 1226, 1239, petition for review granted Oct. 10, 2007, S154847.) Pending resolution of this issue by our high court, we shall follow the prevailing view condoning as constitutional the use of juvenile adjudications as prior convictions under the three strikes law. (*People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; *People v. Buchanan* (2006) 143 Cal.App.4th 139, 149; *People v. Superior Court (Andrades)* (2003)

113 Cal.App.4th 817, 830-834; *People v. Lee* (2003) 111 Cal.App.4th 1310, 1312-1316; *People v. Smith* (2003) 110 Cal.App.4th 1072; 1077-1079; *People v. Bowden* (2002) 102 Cal.App.4th 387, 390-394; *People v. Fowler* (1999) 72 Cal.App.4th 581, 584-587.)

This holding is without prejudice to Gauldin's right to file a petition for writ of habeas corpus raising this issue in the event there is a California Supreme Court decision favorable to his position.

III. *Imposition of Consecutive Terms*

The trial court ordered the terms imposed on counts 6 and 8 (respectively, evading an officer and felon in possession of a firearm) to run consecutively to count 2 (robbery), reasoning that these crimes were separate and distinct from the other offenses. Gauldin contends the trial court's imposition of consecutive sentences violated his right to due process and a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

As Gauldin acknowledges, however, our Supreme Court has rejected his arguments. (*People v. Black* (2007) 41 Cal.4th 799, 820; *People v. Black* (2005) 35 Cal.4th 1238, 1262-1264, overruled in part by *Cunningham v. California* (2007) 549 U.S. 270, 288-293, vacated sub nom. *Black v. California* (2007) 549 U.S. 1190].) Accordingly, we reject his contention because we are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

IV. *Petition for Writ of Habeas Corpus*

Gauldin contends his trial counsel was ineffective in failing to object to Buchanan and Warrick's in-court identification of Carter and Snowden while these individuals wore prison garb and shackles.

To establish ineffective assistance of counsel, Gauldin bears the burden of showing that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions" (*People v. Holt* (1997) 15 Cal.4th 619, 703) and will reverse on the ground of inadequate assistance of counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission (*People v. Zapien* (1993) 4 Cal.4th 929, 980).

In connection with the habeas petition, Gauldin's trial counsel submitted a declaration stating that he had a tactical reason for not objecting, namely, that the defense at trial was that Carter, Snowden and a third person committed the crimes and that minimizing the prejudicial look of Carter and Snowden would have been contrary to that defense. In light of a credible tactical reason for defense counsel's conduct, we cannot say his legal representation fell below an objective standard of reasonableness.

Finally, even if trial counsel's conduct could be viewed as deficient, Gauldin has not demonstrated a reasonable probability the outcome of the trial would have been

different had his counsel objected because the evidence against him was strong and his story lacked credibility.

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

McINTYRE, J.

I CONCUR:

HALLER, J.

HUFFMAN, J., concurring and dissenting.

I concur in both the holding and the reasoning in the majority opinion, with the exception of part II, Use of Prior Juvenile Adjudications as Strikes. I believe the use of such adjudications as strikes is unconstitutional and I therefore dissent from the majority's approval of their use.

The majority opinion recognizes that the issue presented in this case is currently pending before the California Supreme Court. In the absence of other direction by the Supreme Court the majority elects to rely on the weight of California authority that permits the use of juvenile adjudications as strike priors. Certainly the majority is correct that the majority of the California Courts of Appeal have permitted such adjudications to be used as strike priors. It is also true that our Supreme Court will ultimately provide direction on this issue and that the California courts will be required to follow that direction. Pending contrary direction from the Supreme Court, I feel compelled to express my view that the use of juvenile adjudications as strike priors is contrary to federally protected rights because those adjudications are made in a system that denies the juveniles the right to jury trial. In my view the use of such adjudications to dramatically enhance future adult offenses is neither fair nor constitutional.

In *Cunningham v. California* (2007) 549 U.S. 270, the Supreme Court held that California's determinate sentencing law (the DSL), which allowed a judge to impose a sentence above the statutory maximum based on a fact that was neither found by a jury nor admitted by the defendant, violated the right to jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Specifically, the *Cunningham*

court concluded that in this respect, the DSL ran afoul of the rule set forth in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

With respect to the exception for a prior conviction, the *Apprendi* court noted that this exception, set forth in *Almendarez-Torres v. United States* (1998) 523 U.S. 224, "represent[ed] at best an exceptional departure from the historic practice" (*Apprendi*, *supra*, 530 U.S. at p. 487) that required a jury to determine "*the truth of every accusation*" based on proof beyond a reasonable doubt. (*Id.* at p. 477, quoting and citing *United States v. Gaudin* (1995) 515 U.S. 506, 510; italics added in *Apprendi*.) The *Apprendi* court further observed that at the time the Constitution was drafted, the common law did not distinguish between an "element" of a felony offense and a "sentencing factor." (*Apprendi*, *supra*, at p. 478.)

Allowing that *Almendarez-Torres* may have been "incorrectly decided" under the reasoning of *Apprendi*, *supra*, 530 U.S. at page 488, the *Apprendi* court did not overrule the holding in *Almendarez-Torres*, but stressed that "[b]ecause *Almendarez-Torres* had *admitted* the three earlier convictions for aggravated felonies — all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own — no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court." The *Apprendi* court further explained: "Both the certainty that procedural safeguards attached to any 'fact' of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that 'fact' in his

case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a 'fact' increasing punishment beyond the maximum of the statutory range." (*Apprendi, supra*, at p. 488.)

Apprendi, supra, 530 U.S. 466, thus makes clear that the *Almendarez-Torres* exception, which allows a judge to use the fact of a prior conviction to increase a defendant's sentence, is based on the assumption that the prior conviction was obtained in proceedings in which the defendant was afforded procedural safeguards that include a right to jury trial.

Because Gauldin's sentence is based on a prior juvenile adjudication obtained in proceedings in which he was not afforded the procedural safeguards that the *Apprendi* court cited as determinative to the continuing viability of *Almendarez-Torres*, I would conclude that Gauldin's sentence is unconstitutional.

HUFFMAN, Acting P. J.